BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERISA A. RUSSELL, Claimant, v. RUSS'S OVERHEAD DOORS & AWNINGS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 00-020204** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed June 6, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Idaho Falls on December 22, 2004. Claimant was present in person and represented by Brad D. Parkinson of Idaho Falls; Defendant Employer, Russ's Overhead Doors & Awnings, Inc., was represented by Steven J. Wright of Idaho Falls; and, Defendant Surety was represented by Scott R. Hall of Idaho Falls. Surety retained Mr. Wright to represent Employer. The parties presented oral and documentary evidence. This matter was then continued for the taking of three post-hearing depositions, the

submission of two briefs per party, and subsequently came under advisement on March 29, 2004.

BACKGROUND

On March 21, 2005, Employer filed a Motion to Supplement Exhibit List with the Commission. It seeks to enter into the record the medical chart notes of Catherine L. Linderman, M.D., and Lloyd D. Stolworthy, M.D., of Creekside Pain Clinic in Idaho Falls. Claimant sought medical care at the Clinic after the hearing in this matter. Employer argues the chart notes verify the ongoing medical treatment Claimant is receiving and her need for future medical care.

Surety filed an Objection to Employer's Motion on March 23, 2005, arguing the attempt to introduce additional evidence at this late date was prejudicial since it did not have the ability to question or counter the new information. It further argues Claimant bears the responsibility of admitting her medical records, and that there has been no showing Employer is in possession of such information appropriately or with her permission. Surety asks that the chart notes be excluded under JRP Rule 10 (C) (1).

At Employer's request, a telephone conference was held on Employer's Motion on March 28, 2005. Claimant was represented by Mr. Parkinson; Employer by Andrew M. Wayment; and Surety by Scott R. Hall. The parties were given the opportunity to argue their respective positions on the Motion and Objection. Claimant supported Employer's position.

On March 30, 2005, Employer filed an Addendum to its Motion, asking that an additional note from the Clinic be admitted to the record; the new note had been "inadvertently" left out of the prior submission. On March, 31, 2005, Surety filed an Objection to Employer's Addendum, reasserting its prior arguments.

Employer's Motion to Supplement Exhibit List is **DENIED**. Claimant seeks continuing care

from Dr. Linderman to medically manage her prescriptions. Moreover, Surety indicated at hearing that it would pay for Claimant's initial visit to Dr. Linderman which was scheduled after the hearing in this matter.

ISSUES

The noticed issues to be resolved as a result of the hearing are:

1. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

2. Whether Claimant suffers from a psychological accident and injury as delineated in Idaho Code § 72-451;

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

4. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

5. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;

6. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;

7. Whether Claimant is entitled to total permanent disability pursuant to the "odd-lot" doctrine; and,

8. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

ARGUMENTS OF THE PARTIES

Claimant maintains the facts in this case make her argument, that no employer would tolerate or accommodate her need to lie down and miss work as a consequence of her pressure headaches, thereby rendering her unable to perform any work on a daily basis. She cites her inability to continue working for Employer despite accommodations to lie down as needed. Claimant further argues her complaints have been consistent, her condition has not changed since her failed work attempt, and that no physician has questioned her credibility. She seeks continual TTD benefits from the time of her industrial injury until she was found medically stable by Dr. Montalbano, the 24% PPI awarded by Dr. Roberts, none of which should be apportioned since there was no symptomatic pre-existing condition, and total and permanent disability benefits. Claimant also seeks continuing care for her industrially related depression and for her pain management; she acknowledged all past medical bills relating to her industrial injury have been paid.

Employer argues the evidence is uncontroverted Claimant was injured in a June 27, 2000, industrial accident when she reached up to retrieve a box of envelopes off a shelf and heard a popping sound and immediately felt a burning sensation from the top her skull all the way down her back, and that Surety acknowledged she was injured in an industrial accident and began paying medical and TTD benefits. It further argues Claimant is 100% totally and permanently disabled, and also totally and permanently disabled under the odd-lot doctrine because it would be futile for her to seek employment. Employer also argues Claimant should receive TTD benefits from the time of her injury since, due to her pseudoarthrosis, she never recovered from her cervical surgery. It argues Surety should be required to pay for Claimant's continuing psychological care by Dr. Harper and pain treatments by Dr. Linderman.

Surety argues Claimant has failed to demonstrate she suffered a compensable accident since

the event of reaching up is not an untoward event, nor was she injured due to an exposure to a hazard to which she would not have been exposed outside the work environment. It further argues, that since there is no accident, there is no entitlement to a psychological injury claim. Surety also argues Claimant's need for ongoing and further medical care has been extinguished since she failed to proceed with the surgery recommended by Dr. Montalbano, which it characterizes as an unsanitary or unreasonable practice, thereby relieving it of further liability. It argues Claimant's failure to seek further corrective treatment coupled with a stability finding require a finding of a final PPI and the cessation of benefits. Surety further argues it has followed the findings of the medical care providers in the payment of TTD and PPI benefits, that there is no dispute over the 5% psychological PPI rating, and that any additional PPI should be limited to 11% to 15%. It also argues Claimant's PPD is limited and certainly less than total since she is employable in the Idaho Falls labor market, and her work reliability has been established by her near perfect attendance at her medical appointments. Surety then argues any PPI and PPD benefits should be apportioned due to Claimant's pre-existing degenerative conditions.

In response, Employer asks that any assertion of fact in Surety's brief not supported by a citation to the record be stricken in accordance with JRP Rule 12 (B). It argues Surety, in an attempt to show Claimant was not injured in an accident, quotes from clearly inapplicable cases and then attempts to take the Commission to extremes which directly conflict with Idaho case law. Employer further argues Claimant is entitled to future medical treatment as required by her treating physicians for chronic pain and depression, that her refusal to proceed with the recommended surgery was not unreasonable and does not constitute an injurious practice as Surety asserts because of the surgical risks involved, that she is entitled to TTD benefits from the date of her injury until she is determined

to be disabled since she was in a period of recovery the entire time, that she is entitled to the 24% PPI awarded by Dr. Roberts since he used the proper ROM method and did not attempt to apportion for an asymptomatic pre-existing condition as the other physicians did, and that she is totally and permanently disabled. It also argues Claimant has suffered significantly as a result of the progress of her claim. Employer cites inconsistent medical opinions to the point of disbelief, the cycle of terminated and then resumed benefits, and Surety's attempts to rid itself of the burden of her claim by pigeonholing her. It asks the Commission to keep Surety from abandoning Claimant now that she is most vulnerable and in need.

Claimant responds the Commission decision cited by Surety in its argument that she did not suffer an accident was recently remanded by the Idaho Supreme Court to the Commission, and that the Court ruled the Commission erred in concluding the claimant in that case was not injured in an accident. She further argues there is no evidence to support the argument that she no longer requires medical care, and that she is entitled to TTD benefits from the date of her industrial injury until she was found medically stable in August 2004 when she decided not to proceed with a second surgery. Claimant maintains she was in a continual period of recovery during this entire period with a failed fusion. She also argues no physician has assigned her a PPI rating for any degeneration in her cervical spine prior to the industrial accident, or explained the basis for any apportionment. Claimant further maintains her present symptoms were what Dr. Montalbano opined the expected symptoms of pseudoarthrosis would be, *i.e.*, neck pain, suboccipital headaches, and paraspinal muscle spasms, and that Surety has not demonstrated apportionment for a pre-existing condition, an affirmative defense, is appropriate. She asks the Commission to find her entitled to continuing medical care, to TTD benefits for those periods of time in which they were not paid, and to total and

permanent disability.

Surety replies the portion of its Brief Employer points out as missing citations is in essence an opening statement, not a statement of facts, and points out the conclusion section of Employer's brief does not contain citations to the record. It then concedes, that based on a recent Supreme Court ruling, Claimant suffered an untoward event, but that she still has not demonstrated she was injured because of an exposure to a hazard to which she would not have been exposed outside the work environment. Surety maintains the act of reaching is not an extraordinary act which is necessarily associated with the Claimant's employment, and that neither Claimant, nor any medical care provider has associated her injury with an exposure to the work environment. It further argues Claimant's psychological PPI may arise from "litigation neurosis," rather than from an accident, and that her need for further medical care was extinguished by her refusal to proceed with surgery. Surety maintains Claimant cannot choose non-curative measures indefinitely while at the same time continue to incur substantial medical bills, an unreasonable and injurious practice. It further argues Claimant should not be allowed to continue to seek medical care which does not address curative issues. Surety also argues Claimant's and Employer's argument Claimant remained in a period of recovery because a bone scan revealed a failed fusion, fails to consider her condition has remained the same since Dr. Jones' IME, since the discovery of a potential pseudoarthrosis does not create a new disability. It maintains it can only pay TTD and PPI benefits based upon the recommendations and findings of medical care providers. Surety then argues Claimant has failed to point out any change of benefit not supported by a medical opinion. It further argues the correct apportioned PPI rating for Claimant is the 15% agreed to by several physicians, and that she is employable. Surety argues Claimant cannot avoid the recommended cure and claim ongoing disability, and that her

unwillingness to work or seek a cure to her alleged pain does not make her unemployable.

Employer's Motion to Strike portions of Surety's Opening Brief is **DENIED**.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant; her witness Mandy L. Mackay; Employer, Mary A. Russell and Dale L. Russell; Surety representative Kathleen A. Proctor; and Surety witness Richard McKenna taken at the December 22, 2004, hearing;

2. Joint Exhibits 1 through 22 admitted at the hearing;

3. Claimant's Exhibits 2 through 8 admitted at the hearing;

4. Employer's Exhibits 1, 3 through 8, 16, 26 through 28, 31, 34 and 35, 37, 40 through 43, 45 through 48, and 51 through 58 admitted at the hearing;

5. Surety's Exhibits 1 through 5 admitted at the hearing;

6. The deposition of Howard K. Harper, Ph.D., taken by Claimant on December 27, 2004;

7. The deposition of Douglas N. Crum taken by Claimant on December 27, 2004;

8. The deposition of Leroy H. Barton, III, with Exhibit 1, taken by Defendant Surety on January 12, 2005; and,

9. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, (AMA *Guides*) of which the Referee takes notice.

Claimant's objections on pp. 32, 34, and 42 of Mr. Crum's deposition are sustained; Employer's objection on p. 42 is sustained; and Surety's objections on pp. 13, 25, 26, 48, 51, and 52 are sustained, their objections on pp. 15, 16, 24, 28, and 30 are overruled.

Employer's objection on p. 57 of Dr. Harper's deposition is overruled; Surety's objections on pp. 10, 21, 24, 25, 27, 29, 31, 32, 33, 34, 35, 40, 42, 68, 74, and 75 are overruled.

Claimant's objections on pp. 24, 38, and 40 of Mr. Barton's deposition are sustained; Employer's objection on p. 35 is sustained; and, Surety's objections on pp. 61, 66, 76, 77, and 78 are overruled.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 43 years old. She was born and raised in Idaho Falls, and moved with her parents to Salmon in 1974. In 1977 her parents were killed in an automobile accident, and Claimant returned to Idaho Falls to live with her Aunt and Uncle, Mary A. and Dale L. Russell. She dropped out of school after her parents were killed; Claimant had finished the eighth grade. She took classes at a vocational-technical school in the late 1970s in an attempt to earn a GED, but did not finish the program. Claimant found school challenging and performed poorly in tests.

2. Claimant began working for Employer as an installer with Mr. Russell when she turned 18; he was a supervisor for Employer. Prior to this time she had worked as a waitress and potato sorter for short stints. Employer installs and repairs overhead garage doors and openers in both residential and commercial applications. In 1985 the Russells purchased the business. Claimant continued to install and repair doors, became the head installer or installation manager, and kept the business running in the Russell's absences. She also performed clerical work as needed.

The Russells continued to own and operate the business at the time of the hearing.

3. On June 27, 2000, while Claimant was reaching up to take a box of commercial envelopes off a shelf in Employer's office supply room, she heard a popping sound, felt a burning sensation from the top of her head all the way down her back, and tingling in her arms and legs. Claimant is just over five feet tall; she does not recall whether she actually touched the box before experiencing the onset of pain. She immediately reported the incident to Mrs. Russell who was working nearby.

4. Mrs. Russell acknowledged Claimant immediately reported the incident. She indicated she wanted to call an ambulance, but that Claimant refused because she did not believe she was seriously hurt. Mrs. Russell then contacted a chiropractor the family had seen in the past and made an appointment for her to see him the following morning. The incident occurred late in the work day just before quitting time.

5. At the time of the incident, Claimant was being paid $1,250.00 biweekly.

6. Claimant saw Kelly D. Harris, D.C., the following morning. After examining her and diagnosing a probable disk herniation with radicular symptoms, he ordered a MRI of her cervical spine. The MRI, performed later that day, showed disc osteophyte complexes at C5-6 and C6-7, most prominent at C5-6 where there was a mass effect on the spinal cord. Dr. Harris restricted Claimant from working, and because of her radicular symptoms and his belief she had ruptured a disk, he referred her to Brent H. Greenwald, M.D., for a surgical consultation. He did not perform any adjustments.

7. Employer filled out a Form 1 on June 28, 2000, and Surety began paying medical and time-loss benefits effective that date. The Form 1 stated Claimant "was lifting a box down from

overhead & her neck popped."

8. Claimant saw Dr. Greenwald, an Idaho Falls neurosurgeon, on July 6, 2000, complaining of a burning sensation radiating from her neck and general body weakness. He reviewed the films, diagnosed cervical myelopathy, cervical radiculopathy, and herniated disks at C5-6 and C6-7. Dr. Greenwald recommended surgical intervention; Claimant agreed the following day.

9. John W. Swartley, M.D., a Surety physician, approved the surgery on July 10, 2000.

10. On July 11, 2000, Dr. Greenwald performed anterior cervical discectomies at C5-6 and C6-7, and a C5-7 anterior fusion and a C5-7 anterior fixation at Eastern Idaho Regional Medical Center (EIRMC) in Idaho Falls. Bone from the bone bank was used. In his post-operative notes, Dr. Greenwald noted there was an acute component of the disc herniation centrally.

11. Physical therapy at EIRMC followed. On August 30, 2000, Dr. Greenwald released Claimant to light duty work with a 30 pound lifting restriction and minimal neck extension.

12. After returning to part-time clerical work for Employer, Claimant began developing what she characterized as pressure from the base of her skull down her neck and into her shoulders. She indicated her neck would first start aching when unsupported, that the pressure would spread, and that she would have to lay down to alleviate the pain.

13. Surety stopped paying Claimant TTD benefits and began paying TPD benefits on September 5, 2000, when she returned to work part-time. TPD benefits were stopped on September 17, 2000, when she began working full-time. Claimant's time cards for the period September 6, 2000, through September 15, 2000, showing the part-time work are contained in the record. Pay records for 2000 show she received her pre-injury salary the remainder of the year.

14. Employer paid Claimant for working eight hours a day even though she was not able to perform the work, or work that long. Mrs. Russell felt Employer owed it to Claimant to pay her since her work had contributed significantly to making the business. She further stated Claimant was allowed to come and go as necessary based on her condition.

15. Dr. Greenwald's chart notes indicate Claimant began to complain of increasing neck pain, pressure headaches, and weakness and paresthesias in her upper extremities in late 2000 and early 2001. He continued to treat her conservatively.

16. At Surety's request, Claimant saw David C. Simon, M.D., on January 30, 2001, for further evaluation and treatment. She reported soreness and tingling in her neck, and that her arms felt weak and tingly. Dr. Simon, an Idaho Falls physiatrist, ordered electrodiagnostic testing to evaluate Claimant's nerve problems. The EMG and nerve conduction studies showed moderate to severe bilateral carpal tunnel syndrome (CTS) with no evidence of cervical radiculopathy. Dr. Simon attributed Claimant's neck pain to deconditioning and ordered physical therapy at EIRMC; he also opined her arm tingling was caused by her CTS for which he prescribed wrist splints. On February 12, 2001, Claimant complained of headaches to Dr. Simon.

17. Dr. Simon released Claimant to part-time light duty work on February 19, 2001, restricting her from lifting more than 15 pounds. Claimant returned to work, but continued to experience symptoms which limited her ability to work. On March 7, 2001, Dr. Simon suggested Claimant return to Dr. Greenwald for a reevaluation; her physical therapy also ended that day.

18. Surety paid Claimant TTD benefits from January 29, 2001, through February 19, 2001, when she returned to work part-time and TPD benefits were started. Time-cards indicate Claimant worked minimal hours during February 2001 and early March 2001. TTD benefits were

restarted on March 3, 2001, and stopped on March 11, 2001. TPD benefits then began on March 12, 2001, when Claimant began working four hours per day; they ended on September 1, 2001. According to the time-cards, Claimant was working eight hours per day by May 28, 2001. There are no time cards after September 8, 2001. Employer's 2001 pay records would indicate Claimant was paid $7.00 per hour for a 40 hour work week the remainder of the year.

19. Claimant underwent a cervical myelogram/post-myelogram CT at EIRMC on April 19, 2001. It showed an incomplete fusion, instability at C4-5, and central disk bulges at C2-3 and C4-5. Dr. Greenwald noted the study did not really help him explain her symptomatology, although instability at C4-5 could contribute to her headaches, and her CTS could cause some tingling in her fingers. He referred Claimant to Erich W. Garland, M.D., for a consultation.

20. Claimant saw Dr. Garland, an Idaho Falls neurologist, on May 3, 2001, for what she described as pressure headaches. He opined Claimant had cervical spondylosis and degenerative disease at multiple levels now post cervical fusion, and bilateral CTS. Dr. Garland further opined the CTS might be contributing to her upper extremity residual symptoms. He recommended Claimant wear wrist splints, and opined she might benefit from CT releases and an epidural blood patch or a spinal tap to help diagnose the cause of her headaches. Claimant, however, decided to postpone any carpal tunnel release.

21. At Surety's request, Claimant saw Rheim B. Jones, M.D., on August 22, 2001, for an IME. She complained of weakness in her neck and legs, numbness around the lower portion of her neck, dull neck pain increasing in severity the longer she was upright, and headaches which began in her neck. Dr. Jones diagnosed a herniated disk at C5-6 secondary to Claimant's June 27, 2000, industrial injury, status post C5-7 anterior cervical fusion; cervical spondylolysis, unrelated to the

industrial accident; bilateral CTS, not related to the industrial accident; and tension headaches, not related to the industrial accident. He further opined Claimant was medically stable, and assigned her a PPI rating of 25% of which he apportioned 60% to the industrial injury, and 40% to pre-existing conditions; *i.e.*, the industrial component of her PPI rating was 15% of the whole person. The PPI rating was taken from DRE Cervical Category IV of the AMA *Guides*. Dr. Jones also restricted Claimant to light duty work, and recommended no further treatment related to the industrial injury or vocational rehabilitation.

22. In response to an inquiry by Surety, Dr. Simon expressed his disapproval of Dr. Jones' PPI rating. Citing the AMA *Guides*, Dr. Simon indicated the ROM method rather than the DRE method should have been used in determining Claimant's PPI rating. Assuming Dr. Jones' ROM measurements were correct, he assigned Claimant an 18% PPI rating, and after apportionment in accordance with Dr. Jones' percentages for pre-existing conditions, an 11% of the whole person PPI rating attributable to her June 27, 2000, industrial injury.

23. Surety stopped Claimant's TPD benefits on September 1, 2001, and began paying her the 15% of the whole person PPI awarded by Dr. Jones.

24. In late 2001, Claimant reported problems with leg fatigue and popping in her neck to Dr. Greenwald.

25. Claimant completed a TABR test at Eastern Idaho Technical College in November 2001. Her combined results in reading, language, spelling, and mathematics showed she performed at the sixth grade level.

26. At Dr. Greenwald's request, Claimant saw Gary C. Walker, M.D., for a consultation and a second opinion regarding pain management on November 28, 2001. Dr. Walker noted

physical therapy had helped her headaches, and that her symptoms increased with long periods of sitting and standing. Claimant's primary complaints were neck pain, intermittent tingling and numbness involving both arms, and intermittent weakness in her legs. Dr. Walker prescribed physical therapy and continued her light duty work restrictions.

27. On December 19, 2001, Dr. Walker noted improvement in Claimant's neck. He also opined most of Claimant's problems were post-myelopathic residua, and continued her conservative care.

28. Cervical spine x-rays taken of Claimant on January 8, 2002, showed a stable anterior fusion at C5-6 and C6-7, and mild movement at C4-5 suggesting instability.

29. Dr. Walker released Claimant on January 10, 2002, noting her residual neck pain and paresthesias of the legs and arms was likely post myelopathic symptoms of a spinal cord injury. Claimant, however, continued to complain of headaches, paresthesias in the extremities, and fatigue.

30. A March 25, 2002, MRI of Claimant's cervical spine showed normal cervical vertebral body alignment, post-surgical changes as a consequence of the fusion, and congenitally short pedicles throughout the cervical spine resulting in central neural canal stenosis.

31. Employer decided it could no longer afford to pay Claimant for work she could not perform and notified Surety. Based on Employer's pay records, this occurred in mid-April 2002. At the time Claimant was performing clerical work; she was still being paid $7.00 per hour for 40 hours per week. Claimant also contacted Surety asking to see another physician, and for continued medical care.

32. On May 21, 2002, Dr. Walker prescribed the LifeFit program at Elk's Rehabilitation Hospital in Boise; Surety approved the program. Claimant attended the program from June 24,

2002, until July 19, 2002. It was the opinion of the program staff Claimant had a fair outcome, that she met all her activities goals, but that she was still depressed and continued to have chronic headaches. During the program, Claimant was diagnosed with moderate to severe insomnia, dysthymia, and chronic pain syndrome, post-fusion. She left the program with prescriptions for sleeping medications and anti-depressants.

33. Surety paid Claimant TTD benefits during the period she was in the LifeFit program; payment of PPI benefits was resumed on July 20, 2002.

34. In a note dated July 22, 2002, Robert H. Friedman, M.D., opined Claimant could return to her pre-injury position as an installation manager, or her after-injury position as an office clerk, without any restrictions, and that he did not recommend any further medical care. Dr. Friedman is LifeFit's medical director.

35. Claimant returned to Dr. Walker on August 1, 2002, after completing the LifeFit program. He noted she continued to have ongoing headaches and neck pain, that she was discouraged, and that the program was of no particular benefit to her. Because of Claimant's ongoing pressure headaches, Dr. Walker begin prescribing long acting narcotics on August 12, 2002. On September 12, 2002, he noted her chronic pain had a component of depression; her anti-depressant medication was changed.

36. In a letter to Surety dated September 8, 2002, Dr. Friedman opined Claimant was medically stable when she left the LifeFit program, that she could return to work at the light to medium level, that she had no additional PPI, and that no further medical treatment was necessary. He added the anti-depressant Claimant was given during the program could be tapered off after she returned to work.

37. Claimant continued to see Dr. Walker on a monthly basis. He treated her for chronic pain syndrome, depression, and a sleep disorder with medications. Dr. Walker opined all her conditions were related to her cervical fusion.

38. In a letter to Surety dated February 7, 2003, and after reviewing records from Dr. Walker, Dr. Friedman opined Dr. Walker had escalated Claimant's narcotics and adjusted her anti-depressants, and that she had demonstrated a decline in function and increase in pain reports. He recommended she be tapered off narcotics, resume appropriate sleep regime, and that a structured functional improvement program be instituted. Dr. Friedman opined Claimant was pursuing a pain directed and supported behavior program and was seeking disability.

39. A cervical epidural steroid injection performed by Dr. Walker on April 17, 2003, had no effect on Claimant's pain. On May 12, 2003, he reduced Claimant's narcotic pain medication. Dr. Walker felt she should get on with her life and get back to work. On June 12, 2003, he gave Claimant several medial branch blocks; the blocks significantly reduced her pain for a period of time.

40. At Surety's request, Nancy J. Collins, Ph.D., performed a vocational assessment of Claimant. Her report is dated May 19, 2003. Dr. Collins, a Boise vocational rehabilitation counselor, opined Claimant was earning a very good salary with Employer for someone with her educational level. She further opined, that given Claimant's light-duty restrictions, she would be looking at wages closer to $6.00 to $8.00 per hour, or a 56% loss of earning capacity. Dr. Collins also opined, that if Claimant received training, she could increase her access to her labor market and her earning capacity. She provided Claimant with several suggestions for work compatible with her physical restrictions.

41. Claimant returned to Dr. Walker on July 31, 2003, complaining of neck and low back pain, weakness in her legs, fatigue, and increasing painful headaches. A MRI of the lumbar spine was normal. A MRI of the cervical spine showed disk protrusions at C4-5 and C5-6. Dr. Walker also noted Claimant was working part-time for Employer doing filing and chasing parts. Employer's pay records indicate she was working 15 to 20 hours per week and being paid $5.45 per hour.

42. A CT myelogram of Claimant's cervical spine was performed on August 5, 2003. It showed a large left paracentral disk protrusion at C4-5 with severe central canal stenosis at C5-6-7 secondary to a disk osteophyte complex. Dr. Walker attributed Claimant's pain to the narrowing. He referred her to Dr. Greenwald for a surgical evaluation and restricted her from working.

43. Claimant saw Dr. Greenwald. He opined she had signs of cervical myelopathy, not unlike her preoperative signs, along with new symptoms which might be associated with a new disk herniation at C4-5, or a pseudarthrosis at C5-6 and C6-7. Dr. Greenwald further noted bone spurs had developed since the fusion. He presented Claimant with several surgical options.

44. Dr. Walker also referred Claimant to Ronald I. Apfelbaum, M.D., a neurosurgeon at the University of Utah in Salt Lake City for a second opinion on her cervical pain and stenosis. He took her off work pending surgery.

45. Based on Dr. Greenwald's surgical recommendation, Surety resumed paying TTD benefits on August 7, 2003.

46. On her own initiative, Claimant saw Denise Z. Skuster, M.D., in Salt Lake City on October 29, 2003. After reviewing Claimant's MRI and CT myelogram, Dr. Skuster opined Claimant had persistent cervical spinal stenosis and that aggressive conservative therapy had failed. She found evidence of spinal cord compression on examination, and further opined Claimant was

now disabled by her cervical spine disease. Dr. Shuster also opined Claimant should seek an opinion from a neurosurgeon since her surgery had failed and any second surgery would be a very complicated procedure.

47. Claimant saw Michael V. Hajjar, M.D., in Boise for an IME on November 18, 2003. Dr. Hajjar, a neurosurgeon, performed the examination at Surety's request. He opined there were no physical or radiographic findings which would correlate with her continued subjective complaints, that her present complaints did not emanate from her industrial injury, that there was no obvious pathology amendable to surgical treatment, that she was medically stable and could return to clerical work. Dr. Hajjar further indicated his agreement with the 15% PPI rating related to her industrial injury, and pointed out the only study which had not been done of Claimant's cervical spine was a bone scan to address whether she was completely fused.

48. In a December 16, 2003, letter to Surety, Dr. Walker noted Dr. Hajjar was apparently less impressed with the results of the CT myelogram than either Dr. Greenwald or himself. He also informed Surety that he was ordering a bone scan.

49. Dr. Apfelbaum examined Claimant on December 18, 2003. He noted his disagreement with the reading of the August 5, 2003, study, stating he did not see either the large left paracentral disk protrusion or the severe disk osteophyte complex. Dr. Apfelbaum further opined that he did not see any major residual compression of the thecal sac that was impacting the spinal cord or distorting it although he did note minor compression at C5-6. He also opined there was no indication for any further surgery, and recommended therapy directed at relieving muscle spasm rather than strengthening exercises.

50. Claimant saw Dr. Walker on January 14, 2004. They had a long discussion on her

symptoms, and on the differing opinions she was getting from different doctors. He noted she was extremely frustrated.

51. In a January 27, 2004, letter to Surety, Dr. Walker noted the August 5, 2003, CT myelogram had been interpreted three different ways by three different surgeons, but that all three would rather avoid surgery on Claimant, opinions with which he agreed. He did, however, disagree with Dr. Hajjar's opinion that Claimant's present cervical complaints were unrelated to her fusion; he could not understand how such a conclusion could be reached. Dr. Walker also opined Claimant was capable of sedentary light-duty work.

52. At Dr. Walker's request, Claimant saw Howard K. Harper, Ph.D., for a psychological evaluation. She began seeing Dr. Harper, an Idaho Falls psychologist, on February 11, 2004. He diagnosed a major depressive disorder secondary to chronic pain causing mental impairments, and effecting her ability to function day to day. Dr. Harper further opined Claimant would have significant difficulties returning to work for extended periods of time, that the slow progress in obtaining support from Surety was a major contributing factor to her frustration, and that she was incapable of returning to work. He initiated therapeutic sessions. Dr. Harper noted Claimant was diligent in following through with his treatment recommendations.

53. Surety terminated Claimant's benefits effective March 31, 2004; they deemed her medically stable.

54. In a letter to Surety's attorney dated April 1, 2004, Employer questioned why Claimant's benefits had again been terminated without explanation or warning. Mrs. Russell further stated Dr. Greenwald had told her, Mr. Russell, and Claimant, that Claimant showed signs of permanent spinal cord injury. She also stated Dr. Greenwald explained the high risks involved in

another surgery including the loss of vocal cords and speech, the loss of the ability to swallow, paralysis, and even death. Mrs. Russell then questioned Surety's reliance on the opinions of physicians who had not treated Claimant and who had performed minimal examinations of her, and Surety's advice not to hire Claimant back since she posed a high liability risk.

55. Mrs. Russell had accompanied Claimant on virtually all her medical appointments.

56. In a letter to Claimant's attorney dated April 1, 2004, Dr. Harper opined Claimant was dealing with a major depressive disorder, caused or exacerbated by her chronic pain and resulting in mental impairments which effect her ability to function day to day. He further opined her ability to return to the workforce was significantly impacted by her condition and that she could not return to the workforce on a consistent basis; he recommended she seek a work release.

57. The bone scan of Claimant's cervical spine ordered by Dr. Walker was conducted on April 13, 2004, at EIRMC. The study showed abnormal radiopharmaceutical activity at C5-6 and C6-7 unrelated to the surgery itself, and that the abnormal activity could be instability, an incomplete fusion, or hardware loosening. Dr. Walker suggested to Claimant that she return to Dr. Greenwald.

58. Claimant had filled out an application for employment with Melaleuca in Idaho Falls on April 6, 2004, but did not appear for a scheduled interview on April 16, 2004. She found out about the opening through Job Service. Claimant also applied for work at four other businesses, but only interviewed at Basic American Foods in Shelley, where she was told she could not physically perform the jobs available; she was not contacted for an interview by the other businesses.

59. In a letter dated April 20, 2004, Dr. Greenwald noted Claimant continued to experience a great deal of discomfort in the back of her head, and weakness in her arms and legs. He

opined Claimant was not medically stable from a spinal standpoint, that she was a candidate for continued TTD benefits, and that stability depended on future surgical intervention.

60. Claimant returned to Dr. Greenwald on April 29, 2004. He noted that both Dr. Apfelbaum and Dr. Hajjar felt Claimant had a solid fusion at C5-6 and C6-7, while a bone scan most likely showed a incomplete fusion. In addition, Dr. Greenwald opined she had a possible disk herniation at C4-5 and cervical myelopathy. He felt another myelogram/post myelogram CT should be conducted.

61. Claimant reviewed her cervical myelogram/post-myelogram CT with Dr. Greenwald on May 20, 2004. The CT had been conducted earlier that day at EIRMC. The discussion centered on different interpretations of previous studies. Dr. Greenwald opined the CT did not show any evidence of instability at C5-6 and at C6-7 as had been previously noted. He felt there was a solid incorporation of bone in each of the bone plugs. Dr. Greenwald noted a small bone spur at C5-6 indenting the thecal sac, but did not feel it was causing any significant neuroforaminal stenosis. He also noted a disk herniation directly above the fusion at C4-5 which might be contributing to some neuroforaminal stenosis. Dr. Greenwald then indicated he did not feel any surgical intervention was indicated, but opined Claimant suffered from quite a bit of disability due to her discomfort.

62. At Surety's request, Claimant saw Craig W. Beaver, Ph.D., for a neuropsychological evaluation as part of an IME panel on May 24, 2004. He gave Claimant a neuropsychometric test battery consisting of some 13 individual tests. Based on the testing, Dr. Beaver, a Boise psychologist, opined Claimant showed some cognitive difficulties that appeared to be related to below average premorbid intellectual skills and abilities, with a possible learning disability, and limited education, combined with decreased cognitive efficiency secondary to her depression and

internal distractibility related to her pain. Based on the DSM-IV, he further opined Claimant had an Axis I diagnosis: Chronic pain disorder associated with psychological factors and general medical condition, a single episode of a major depressive disorder, and a possible learning disorder; and, Axis II diagnosis: Borderline intellectual functioning and evidence of possible schizoid personality traits. Dr. Beaver also opined Claimant was not medically stable relative to her psychological condition, that she needed aggressive treatment for her major depression including a much more aggressive psychopharmacological intervention for her emotional distress and psychotherapy, and that from a psychological perspective, he did not see the industrial injury resulting in any employment restrictions, but that due to her limited education and below average intellectual skills, she was not likely to do well in work that required much in the way of academic skills.

63. At Surety's request, Claimant saw Paul J. Montalbano, M.D., for a neurological evaluation as part of the IME panel on May 28, 2004. After reviewing various medical records, Dr. Montalbano, a Boise neurosurgeon, recommended surgical intervention to include removal of her anterior cervical buttress plate and an assessment of her fusion. He further indicated, that if there was evidence of a pseudoarthrosis, she would need to undergo a redo cervical decompression, fusion, and instrumentation. Dr. Montalbano also opined a pseudoarthrosis would account for her neck pain and headaches, but that even with a redo, she might still continue to have symptomatology, and that a multitude of her symptoms were related to her depression.

64. At Surety's request, Claimant also saw Nancy E. Greenwald, M.D., as part of the IME panel on May 25, 2004. Dr. Nancy Greenwald, a Boise psysiatrist, authored the panel's final report. She noted, that after an EMG she conducted, Claimant fulfilled the criteria for bilateral CTS. The panel opined Claimant was not medically stable, that she had a pseudoarthrosis and surgical

intervention was recommended, that her cervical findings were related to her work injury of June 27, 2000, and that any final PPI rating should consider her congenitally shortened pedicles as well as arthritic changes. The panel, however, was unable to explain the etiology for Claimant's lower extremity complaints.

65. In a letter to Surety dated June 7, 2004, and in response to their questions, Dr. Walker stated he had referred Claimant to Dr. Harper for a psychological consultation, noted he had first discussed depression with Claimant in September 2002, that she had been treated for depression while attending the LifeFit program, and opined that her depression was likely related to her chronic pain associated with her neck pain. He further opined Claimant's inability to work was also contributing to her depression.

66. Surety notified Claimant in a letter dated June 22, 2004, that the surgery recommended by Dr. Montalbano would be authorized. Claimant was given 14 days to decide whether or not to proceed. The deadline was later extended.

67. In a letter to Surety dated July 6, 2004, Dr. Montalbano opined, after reviewing a preoperative MRI, that he did not find any indication of a spinal cord injury, but that there was central canal stenosis at the operative levels. He further opined Claimant's condition was related to posterior osteophytic disease, a degenerative condition. In an August 20, 2004, response to questions posed by Surety, Dr. Montalbano indicated, that if Claimant chose not to proceed with the surgical procedures he had recommended, she was medically stable and released to work with medium work restrictions. He also indicated his agreement with the 15% PPI rating given by Dr. Jones.

68. At Surety's request, Dr. Beaver reviewed Dr. Harper's chart notes. In a letter to

Surety dated July 7, 2004, he opined Claimant had the ability to succeed at sedentary employment with her depression, but that further treatment and hopefully improvement in her depression and/or pain would add to her employment success. Dr. Beaver recommended Claimant be treated more aggressively for her depression, and that she should be restricted to working half-time for 30 to 60 days.

69. On July 16, 2004, Surety reinstated Claimant's TTD benefits retroactive to March 31, 2004. The benefits were based on Dr. Beavers' opinion she could work part-time, and Employer's indication light duty part-time work was not available. The benefits ended on September 16, 2004.

70. Again at Surety's request, Dr. Beaver reviewed more medical records pertaining to Claimant and her care; he also spoke directly with Dr. Harper. In a report dated September 8, 2004, he noted Dr. Harper indicated to him that Claimant had been very compliant in following through with his treatment recommendations and their psychotherapeutic sessions, that she was struggling with the question of having further surgery, that she was confused by the amount of information that she had been given, that she got quite anxious and emotionally distressed when thinking about the choices facing her, that it was difficult for her to accept the fact she could never install garage doors again, that she would benefit from additional treatment, and that she might well need an anti-depressant for an extended period of time. Dr. Beaver's DSM-V Axis I diagnosis was: Chronic pain disorder associated with psychological factors and general medical condition; recurrent major depressive disorder; and possible verbal learning disorder. He further opined the predominant cause of Claimant's depression was related to her chronic pain and physical limitations that resulted from the work injury of June 27, 2000, that she was capable of working within her physical restrictions, and that she was medically stable. Dr. Beaver did, however, recommend Claimant receive additional

psychotherapeutic sessions with Dr. Harper and that she continue taking anti-depressant medications. He also opined, given the ongoing nature of her emotional distress which has not resolved with treatment, Claimant was entitled to a PPI rating, under the AMA *Guides*, of 5% of the whole person for her depression which was industrially related. The rating was taken from Table 14-1 of the AMA *Guides*, and represents a Class 2 Mild Impairment. Dr. Beaver is an Idaho licensed psychologist.

71. In a note to Surety dated September 16, 2004, Dr. Walker opined Claimant should pursue surgery, but that if she did not, she was medically stable.

72. Based on Dr. Beaver's opinion, Surety terminated Claimant's TTD benefits on September 17, 2004, and began paying the 5% PPI he awarded her.

73. Claimant last saw Dr. Walker on September 29, 2004. He noted Dr. Montalbano recommended surgery, but that she was not interested in pursuing surgery. Dr. Walker also noted she continued to have significant pain complaints. He referred Claimant to Catherine L. Linderman, M.D., for ongoing pain management and care. Dr. Walker indicated he had no interest in continuing to see Claimant.

74. Claimant continued to see Dr. Harper several times a month through at least October 2004 for individual counseling and supportive psychotherapy sessions. In a letter to Claimant's counsel dated October 20, 2004, Dr. Harper indicated Claimant had made progress and that he agreed with Dr. Beaver's assessment that her psychological difficulties would not be a barrier to her returning to work. He opined that if Claimant's chronic pain condition and corresponding medical conditions could be alleviated she would be able and anxious to return to work. Dr. Harper also noted Claimant was experiencing a heightened level of anxiety secondary to the differing medical

opinions and recommendations she was receiving, making the treatment of her chronic pain more difficult. He recommended ongoing treatment to cope with medical treatment and transitions related to employment.

75. At her attorney's request, Claimant underwent a Functional Capacity Evaluation (FCE) at Channing Physical Therapy in Idaho Falls on October 26 and 28, 2004. In summary, Claimant was found to be capable of light work, that lifting over 20 pounds resulted in cervical pain, and that she would be unable to sit for a prolonged period of time with her symptoms. The test was viewed as valid. It was recommended Claimant work in a light-duty environment which allowed a variety of work postures.

76. Surety retained the Bureau of Investigative Services to conduct *sub rosa* surveillance of Claimant. The surveillance was conducted on November 9 and 11, 2004, by Richard McKenna. The video tape he took showed Claimant driving her pick-up on various errands, including taking her son to school, going to restaurants, going to her aunt and uncles' residence, and going to Employer's place of business. Outside of driving the pick-up, she demonstrated the same physical abilities during the hearing. She was also in obvious pain as the hearing progressed through the late afternoon.

77. At her attorney's request, Claimant saw Douglas N. Crum for a disability evaluation. His report is dated December 9, 2004. Mr. Crum, a Boise vocational rehabilitation counselor, noted, that based on Dr. Beaver's testing, Claimant was functionally illiterate. He further noted she did not know how to type, that she had very basic computer skills, that she had very limited office skills, and that she had very few transferable skills from a garage door installer to lighter work. Mr. Crum opined Claimant's permanent physical restrictions, her almost non-existent residual transferable

skills for physically compatible work, her extremely narrow ranging work history, and her low educational level and functional illiteracy, had reduced her labor market access to the point where she no longer had any practical ability to obtain or perform any sort of permanent, regularly occurring full-time occupation in her labor market. He further opined Claimant was totally and permanently disabled.

78. At her attorney's request, Claimant saw Eric C. Roberts, M.D., for an IME on December 9, 2004. After examining Claimant and reviewing her medical records, Dr. Roberts, an Idaho Falls physiatrist, diagnosed a probable cervical pseudoarthrosis, C4-5 protruding disk disease post fusion, residual cervical radiculopathy, neck pain, muscle spasm, major depression associated with chronic pain, bilateral shoulder pain, and muscle contraction headaches, all related to her June 27, 2000, industrial injury and subsequent surgery. He noted Claimant was one of those individuals with cervical pseudoarthrosis who did not have a good outcome. Dr. Roberts opined she would have good days where she could function and bad days where she could not; he estimated she would miss four days per month from work with bad days. He further opined Claimant would require lifetime chronic narcotic analgesia with follow-up on a routine basis, and that she would also require ongoing psychological/psychiatric evaluation and potential treatment for recurrent major depression.

79. Dr. Roberts further opined, based on the AMA *Guides*, and using the ROM model and a two level fusion with a herniated disk at a third level, that Claimant had a PPI rating of 24% of the whole person with no apportionment. The rating included the 5% PPI awarded by Dr. Beaver with which he agreed. In making his rating, Dr. Roberts noted, that under the AMA *Guides*, there is no apportionment for asymptomatic pre-existing degenerative changes of the spine. All his opinions

were to a reasonable degree of medical probability.

80. At Surety's request, Leroy H. Barton, III, conducted an exploration of jobs available to Claimant in her labor market consistent with the medical restrictions relative to her industrial injury of June 27, 2000. Mr. Barton, a Boise vocational rehabilitation counselor, opined there were a number of jobs openings in Claimant's labor market which would meet her requirements. These included Wal-Mart greeter, security guard, night auditor, motel desk clerk, general office clerk, shelter home monitor, and job coach. He estimated the jobs paid between $6.50 and $9.50 per hour.

81. Mr. Barton submitted a listing of the jobs he opined Claimant was capable of performing, and of the one Claimant was scheduled to interview for at Melaleuca, to Dr. Walker and to Dr. Montalbano. Both physicians approved all the jobs. The lifting requirements for the Melaleuca job exceeded Claimant's light duty work restriction.

82. At hearing, Mr. Russell stated Claimant made Employer the company it is today through her work ethic and reputation, and that she was what the company stood for. He added that after her injury, she was a changed person who had good days and bad days. Mr. Russell further stated he could not hire Claimant in her present condition for office clerical work because of his concern over whether she would be functional on any given day.

83. At hearing, Mrs. Russell stated Claimant did anything and everything to make Employer successful. She further stated she had brought her into the office and was attempting to teach her the administrative end of the business, but that it was difficult to teach her because she had a very difficult time understanding the various procedures and working with computers. Mrs. Russell also stated Claimant did not have the skills necessary to deal with the financial aspects of the business. She further stated she would employ Claimant if she could, but that it was impossible to

do so because she was incapable of working.

84. The Russells interface with Claimant on a daily basis. Mrs. Russell stated Claimant would have to lie down whenever her headaches got bad, and that she would periodically just start crying. Mrs. Russell and Claimant have a mother/daughter relationship.

85. At his post-hearing deposition, Mr. Crum indicated that he could not identify any jobs he believed Claimant could perform. He based his opinion on her light duty work restriction; her limited capacity for standing, walking, and sitting; her need to change positions on a regular basis; her inability to do a lot of repetitive cervical flexion, rotation, and extension; her limited academic skills; her lack of clerical skills; and her low intelligence level. Mr. Crum further opined any job search by Claimant would be futile because no employer was going to have a job that matched her combination of skills, ability, education, and residual functional capacities.

86. At his post-hearing deposition, Dr. Harper, an Idaho licensed psychologist, opined one of Claimant's symptoms of major depression was a sense of resignation or hopelessness in which she saw herself incapable of performing work different than what she had performed in the past, and that areas which were once her strengths were now limited. He further opined Claimant was capable of a number of things between headaches, but that when one came on, she had to lay down and rest. Dr. Harper also opined, that if her physical restrictions were removed, Claimant could return to work with counseling and medication. He added that chronic pain patients tend to overextend themselves with activities during pain free periods, and then the pain comes back at a more severe level. Dr. Harper opined Claimant's current level of depression was moderate, that she benefited very significantly with therapy, and that she required medication although he could not estimate the length of any treatment. He further opined Claimant's psychological concerns were

very much an offshoot of her industrial injury. Dr. Harper observed, that when Claimant reported having a headache to him, she had a hard time keeping her eyes open, she appeared to be fighting off pain, she had a hard time thinking, her speech becomes slower and less clear, and that she bowed her head, hunched, and cringed. He opined Claimant was confused, frustrated, and angry over the differing opinions from the physicians, and that the frustration contributed to her depression. Dr. Harper expressed his belief Claimant would return to work in any job she was capable of performing if she could deal with her pain.

87. At his post-hearing deposition, Mr. Barton opined Claimant had not made a reasonable job search, and that if she searched for a job, it would not be futile. He acknowledged that he had not specifically addressed Claimant's restrictions when speaking to the Wal-Mart recruiter, that missing more than two days a month on a consistent basis would put an individuals' job in jeopardy, especially when working on the low end of the scale, and that he was unaware of anything Employer had not done to accommodate Claimant.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Accident (Causation).** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place

where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The Idaho Supreme Court has long held that an employee may be compensated for the aggravation or acceleration of his/her pre-existing condition, but only if such aggravation results from an industrial accident as defined by Idaho Code § 72-102 (17). *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

Surety accepted Claimant's claim for compensation and paid medical benefits, including a cervical fusion and psychological counseling, paid several periods of TTD benefits, and paid two PPI ratings, all over a period of four years, before asserting the June 27, 2000, lifting incident did not meet the definition of an industrial accident. It now argues, that under the statute, she was not exposed to a hazard to which she would not have been exposed outside the work environment.

Surety further argues the act of reaching up, which they maintain Claimant was doing when she felt the onset pain, is not an extraordinary act which is necessarily associated with Claimant's employment; it could have happened anywhere, anytime. Claimant, however, testified she had "no clue" whether she actually retrieved the box or not. (Transcript, pp. 181-182). Mrs. Russell was working nearby at the time of the incident and later prepared a Form 1 in which she wrote Claimant "was lifting a box down from overhead & her neck popped." Both Claimant and Mrs. Russell signed the Form 1. The Referee finds Claimant's act of lifting a box of office supplies down from a shelf is associated with her work environment; it is not an idiopathic event.

All the medical evidence in the record attributes Claimant's cervical condition to the lifting incident; there is none to the contrary. Dr. Greenwald pointed out in his operative notes that there were signs of an acute herniation. Thus, the Referee concludes Claimant injured her cervical spine in a work-related lifting accident on June 27, 2000, for which she is entitled to compensation.

2. **Psychological Accident/Injury.** Idaho Code § 72-451 provides that under certain conditions psychological injuries emanating from the workplace will only be compensated if caused by an accident and physical injury as defined in Idaho Code § 72-102; that such injury and accident must be the predominant cause as compared to all other causes; that such psychological injuries exist in a real and objective sense; and that clear and convincing evidence that the psychological injuries arose out of and in the course of employment from an accident is required. In addition, any PPI or PPD rating for a psychological injury must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the latest edition of the APA DSM, and must be made by a psychologist or psychiatric duly licensed to practice in the jurisdiction in which treatment is rendered.

Dr. Beaver opined Claimant suffered from chronic pain and depression, both DSM-V Axis I diagnoses, and that the predominant cause of her depression was the chronic pain that resulted from her June 27, 2000, industrial injury. He had evaluated Claimant at Surety's request. Dr. Harper, who treated Claimant for her depression, echoed Dr. Beaver's opinions. Both are licensed Idaho psychologists. The weight of these opinions, along with the medical records as a whole, provides the requisite clear and convincing evidence Claimant's cervical injury and industrial accident were the predominant cause of her psychological injuries, and that these injuries exist in a real and objective sense. The Referee finds the requirements of Idaho Code § 72-451 have been met. Moreover, Claimant was prescribed anti-depressants while attending the LifeFit program. Thus, the Referee concludes Claimant is entitled to compensation for the psychological injuries she suffered as a consequence of her June 27, 2000, industrial accident.

3. **Medical Benefits.** The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432 (1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

Surety has raised the injurious practices issue by claiming Claimant's refusal to proceed with the exploratory surgery recommended by Dr. Montalbano is an unsanitary or unreasonable practice,

extinguishing her need for ongoing and future medical care. This argument is absurd. The proposed surgery could have included a complete redo of the fusion along with its attendant risks, risks explained to her by Dr. Greenwald, who was against another surgery, and risks she decided not to take. Even if she had proceeded with the surgery, it may not have corrected Claimant's problems, and could have left her in a worse condition. Labeling the recommended procedure corrective does not give the full picture; the variety of medical opinions and the diverging opinions of what a particular film showed, would cause anyone to question any individual opinion.

The parties pretty much agreed Claimant's medical bills through the date of the hearing had been paid. The question raised, however, is the future medical care recommended by Dr. Harper for Claimant's depression, and the management of her medications by Dr. Linderman. Dr. Harper opined one session per week with Claimant worked well, but that he could not estimate the length of any treatment course. Dr. Walker had referred Claimant to Dr. Linderman and Surety had agreed to pay for an initial consultation with her. In addition to pain medication, Dr. Linderman would also be prescribing anti-depressant medications in conjunction with Dr. Harper's sessions. The Referee finds it inappropriate to grant a blanket approval of unknown and potential future medical care. Thus, the Referee concludes the issue of future medical benefits is retained.

4. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a

claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C. P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986) (emphasis in original).

Claimant asserts she is entitled to TTD benefits from the date of her industrial injury until she was found to be medically stable. She maintains the date of stability is the date she decided not to pursue an exploratory surgical procedure and possible refusion by Dr. Montalbano, *i.e.*, the date he found her medically stable. Employer argues the period of disability continues to the present. Surety maintains TTD and TPD benefits have been paid for every period of time Claimant was restricted from working by her treaters and by IME panel member recommendations.

Surety terminated Claimant's last period of TTD benefits on September 17, 2004, and began paying her PPI benefits. The date of termination coincided with the award of a PPI rating by Dr. Beaver, indicative of medical stability, and the opinion of Dr. Walker, Claimant's treating physician, that she was medically stable if she did not pursue surgery. She had chosen not to pursue further

surgery. Therefore, the Referee finds Claimant was medically stable on September 17, 2004.

Claimant has not pointed out any specific period in which she was actually and totally disabled from work by a physician, and for which Surety has not already paid either TTD or TPD benefits. Thus, the Referee concludes Claimant is not entitled to any additional temporary total disability (TTD) benefits.

5. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

This matter is characterized by medical opinions generated over a multi-year period, changing and contradictory diagnoses, and diverging and changing opinions on what the various films show. That being said, the Referee finds it appropriate to look at the overall evolution of this matter and at the PPI ratings made closer to the date of Claimant's medical stability.

Two industrially related PPI ratings need to be addressed. The first is the 5% PPI awarded by Dr. Beaver, a member of Surety's IME panel. The rating is taken from Table 14-1 of the AMA *Guides*, and represents a Class 2 Mild Impairment. In his September 8, 2004, letter to Surety, Dr.

Beaver sets forth the rationale for his rating in a clear and concise manner. Dr. Harper, Claimant's treating psychologist, also opined the rating was appropriate. Thus, the Referee concludes Claimant is entitled to a permanent partial impairment (PPI) rating of 5% of the whole person for her Mental and Behavioral Disorder. There was no apportionment.

The second rating that needs to be addressed concerns Claimant's cervical injury and subsequent multi-level fusion. There are two methods for determining spinal impairment ratings under the AMA *Guides*, the diagnosis-related estimate (DRE) method and the range-of-motion (ROM) method. While the DRE method is the principal method, the ROM method is preferred in cases where there is an alteration of motion segment integrity at multiple levels, in this case a multi-level fusion from C5-7; in addition there is a herniated disk at C4-5. Dr. Roberts, who performed an IME December 9, 2004, using the ROM method, opined Claimant had a PPI rating of 24% of the whole person for her cervical injury; this included Dr. Beaver's rating.

The ROM method actually consists of three elements that need to be assessed: (1) the range-of-motion of the impaired spine region; (2) accompanying diagnoses; and (3) any spinal nerve deficit. Dr. Roberts gave Claimant a 12% rating from Table 15-7 IV E., [element 2]; and 2% for flexion, 2% for extension, 2% for left lateral bending, 1% for right lateral bending, 1% for left rotation, and 1% for right rotation [element 1]. There was no rating for element 3. Using the combined values chart, these individual ratings, along with the 5% rating by Dr. Beaver, combine for a total PPI rating of 24% of the whole person, all directly related to her June 27, 2000, industrial injury. Dr. Roberts did not find apportionment was appropriate, since there is nothing in the medical record to indicate Claimant's degenerative cervical condition was symptomatic at the time of her injury. The Referee finds Dr. Roberts' rating persuasive because it considers all aspects of

Claimant's condition from a hind-sight perspective, and was given closest in time to her medical stability and reflects her actual range of motion restrictions at stability.

In so finding, the Referee notes Dr. Jones assigned Claimant a 25% PPI rating based on the low end of DRE Category IV found in Table 15-5 of the AMA *Guides* after his August 2001 IME. In addition, Dr. Simon, who used the ROM method and Dr. Jones' measurements, assigned Claimant an 18% PPI rating for her cervical fusion. Combining this rating with Dr. Beavers' later 5% PPI rating, Claimant would have received a 22% PPI rating. All of the other physicians merely concurred with one of these ratings.

Thus, the Referee concludes Claimant is entitled to a permanent partial impairment (PPI) rating of 24% of the whole person. Surety is entitled to credit for any amounts previously paid.

6. **Permanent Disability**. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open

labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate he or she is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his or her medical impairment together with the pertinent nonmedical factors totals 100%. If the claimant has met this burden, then total and permanent disability has been established. If, however, the claimant has proven something less than 100% disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Here, Claimant argues she is totally and permanently disabled under either method. The odd-lot doctrine, however, only comes into play once a claimant has proven something less than 100% disability. *E.g.*, *Hegel v. Kuhlman Brothers, Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989).

Claimant has been given permanent work restrictions by various physicians ranging from sedentary to medium work. A FCE showed she was capable of light work. On the whole, the

balance of the evidence shows Claimant is capable of performing light work with no overhead lifting and the ability to periodically change positions, and the Referee so finds. Light work entails lifting up to 20 pounds on an occasional basis, and up to ten pounds on a frequent basis.

Mr. Crum and Mr. Barton have offered diverging vocational assessments of Claimant's employability. Mr. Crum opined she was functionally illiterate, possessed few if any transferable skills, and no longer had the ability to obtain or perform full-time employment in her labor market. He further opined Claimant was totally and permanently disabled, and that it would be futile for her to look for work. Mr. Barton's opinion was considerably more optimistic. He identified several jobs in the Idaho Falls area which he opined would fit within Claimant's physical restrictions, although in some cases, job modifications would be necessary. The reality of the matter, that based on Dr. Beaver's testing, Claimant is on the borderline of functional illiteracy. She is simply not capable of performing some of the jobs identified by Mr. Barton. How can you function as a night auditor with minimal math skills? There is a difference between the physical ability to perform a job and the intellectual ability to perform a job; physicians only address the former.

Claimant's work experience is installing garage doors. She was very good at it and took pride in her work. While Claimant can no longer perform this type of work, she has acquired skills which are transferable to sedentary or light work, particularly in the customer service area. Claimant has also demonstrated she is a dedicated and reliable employee, attributes employers seek out. On the other hand, Mrs. Russell indicated Claimant had minimal clerical skills and had trouble comprehending the tasks required of an office worker.

The Referee finds the opinion of Dr. Collins is too remote in time to be meaningful in this matter, although even then, she identified a significant wage loss for Claimant.

Based on Claimant's total impairment rating of 24% of the whole person and her permanent work restrictions, and considering her non-medical factors, including her age, lack of education, transferable skills in customer service, her untreated bilateral CTS, and her personal situation, the Referee finds Claimant's ability to engage in gainful activity has been significantly reduced. Her primary opportunity for employment is now minimum wage sedentary to light service industrial positions; she can expect to earn approximately one-third of her time-of-injury salary. Thus, the Referee concludes Claimant has not demonstrated she is 100% totally and permanently disabled.

Claimant can also demonstrate total disability by fitting within the definition of an odd-lot worker. An odd-lot worker is one "so injured that he [or she] can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status lies with the claimant who must prove the unavailability of suitable work. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his or her burden of proof and establish odd-lot disability status in one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or

3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

Claimant has not attempted other types of employment without success. She had performed clerical work for Employer for an extended period, and also in conjunction with her installation responsibilities, prior to her industrial injury. Therefore, her light-duty work for Employer after her injury cannot be characterized as another type of employment. The Referee finds Claimant has failed to establish odd-lot status under the first prong of the *Lethrud* test.

Claimant cannot demonstrate that either she, or vocational counselors or employment agencies, searched for employment on her behalf without success. She did not conduct a serious job search by only contacting five businesses; she also failed to attend or reschedule the interview with Melaleuca. Mr. Crum did not look for any jobs for her; he just opined none were available. Dr. Collins and Mr. Barton both suggested jobs to Claimant they believed she could obtain. There is no indication in the record she pursued any of these potential opportunities. The Referee finds Claimant has failed to establish odd-lot status under the second prong of the *Lethrud* test.

Claimant, relying on the opinion of Mr. Crum, argues any work search would be futile. Mr. Barton argues jobs within her physical restrictions were available. The most telling evidence here is Employer paid Claimant for light duty-work, work which she should have been physically capable of performing, but was not due to her industrial injury and its consequences. Only a sympathetic employer would have allowed Claimant to come and go, and to lie down on the job as Employer did. The financial hardship eventually became too great and Employer could no longer afford to pay Claimant. Moreover, Mrs. Russell testified Surety advised her not to hire Claimant back since she

posed a high liability risk. The Referee finds Claimant has shown that any efforts to find suitable work would be futile. Therefore, the Referee further finds Claimant has satisfied her burden of proof and established odd-lot status under the third prong of the *Lethrud* test.

Once a claimant has satisfied his or her burden of demonstrating a *prima facie* case of being within the odd-lot category, the burden then shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. The employer must show there is an actual job within a reasonable distance from the claimant's residence which he or she is able to perform or for which he or she can be trained. In addition, the employer must show the claimant has a reasonable opportunity to be employed at that job. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 701, 619 P.2d 1152, 1154 (1980).

Defendants have not carried their burden. They have not shown an actual and suitable job is available to Claimant. Mr. Barton spoke with a Wal-Mart representative at Job Service during a job fair about openings for greeters. While there were several openings at a new store, he was told Claimant would still have to apply for the position, just like any other job seeker. Mr. Barton also spoke with an individual at Melaleuca about the job Claimant was scheduled to interview for, and that an interest in interviewing Claimant was expressed. The lifting requirements for the position, however, exceeded Claimant's restrictions; Dr. Walker had noted the job would need to be modified to accommodate Claimant. Mr. Barton acknowledged the discrepancy, but indicated Melaleuca could accommodate Claimant. Possible accommodations do not equate to an actual and suitable job. Thus, the Referee concludes Claimant is totally and permanently disabled under the "odd-lot" doctrine.

7. **Apportionment.** Idaho Code § 72-406 (1) provides that in cases of permanent

disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The Idaho Supreme Court has held that under Idaho Code § 72-406, employers do not become liable for all of the disability resulting from the combined causes of a pre-existing injury and/or infirmity and the work-related injury, but only for that portion of the disability attributable to the work-related injury. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 929, 772 P.2d 119, 136 (1989). The Court further held that any apportionment under Idaho Code § 72-406 must be explained with sufficient rationale to enable it to review whether the apportionment is supported by substantial and competent evidence. *Reiher v. American Fine Foods*, 126 Idaho 58, 62, 878 P.2d 757, 761 (1994).

There is nothing in the medical records submitted to the Commission that demonstrates the degree or duration of Claimant's disability resulting from her cervical injury has been increased or prolonged because of any pre-existing impairment. She worked without restriction prior to her industrial injury. There is also no evidence her degenerative cervical condition was symptomatic and impaired her in any way prior to the industrial injury. The fact Claimant saw a chiropractor periodically prior to her industrial injury for back and shoulder pain cannot be the basis for apportioning away disability resulting from a cervical injury as Surety suggests. Thus, the Referee concludes apportionment under the statute is not appropriate in this matter.

CONCLUSIONS OF LAW

1. Claimant injured her cervical spine in a June 27, 2000, industrial accident; she is entitled to compensation for the injury.

2. Claimant is entitled to compensation for the psychological injuries she suffered as a consequence of her June 27, 2000, industrial accident.

3. The issue of future medical benefits is retained.

4. Claimant is not entitled to any additional temporary total disability (TTD) benefits.

5. Claimant is entitled to a permanent partial impairment (PPI) rating of 24% of the whole person. Surety is entitled to credit for any amounts previously paid.

6. Claimant is totally and permanently disabled under the "odd-lot" doctrine.

7. Apportionment under Idaho Code § 72-406 is not appropriate in this matter.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 19th day of May, 2005.

INDUSTRIAL COMMISSION

/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th___ day of __June_____, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

BRAD D PARKINSON
PETERSON PARKINSON & ARNOLD PLLC
PO BOX 1645
IDAHO FALLS ID 83403-1645

STEVEN J WRIGHT
WRIGHT WRIGHT & JOHNSON PLLC
PO BOX 50578
IDAHO FALLS ID 83405-0578

SCOTT R HALL
ANDERSON NELSON HALL SMITH PA
PO BOX 51630
IDAHO FALLS ID 83405-1630

kkr /s/_____